OCCUPATION UNDER THE LAWS OF WAR

It is the fashion to date events in political, economic and social life in their chronological relation to those armed conflicts which have been the turning points and remain, to a man retracing the progress of nations, as conspicuous guide posts of history. Thus we have the phrases *"ante bellum"* and *"post bellum."* But there is a further use of Latin quite appropriate to this analysis, a use more common to the courts of law than either of the two phrases already mentioned that slip so trippingly off the tongues of the generality of mankind. Many a judge and jurist, many an advocate and publicist, has employed in the midst of learned argumentation the words *"flagrante bello"* or else *"nondum cessante bello."* Here in the dead speech of ancient Rome, still occasionally living on the lips of modern men, are appropriate distinctions with regard to the status of territory occupied by troops of a foreign nation.

If the occupation takes place, *ante bellum,* prior to open and acknowledged hostilities, it is deemed "intervention" or else becomes a cause of war and is merged in character and results with purely belligerent activities.[1] In such circumstances it is not occupation at all, neither in popular parlance nor in law.

If the occupation exists after the signing of the treaty of peace, *post bellum,* it exists by virtue of the treaty. Incidents relating to such occupation are to be scrutinized only in the light of the status created by the terms of the treaty of peace. If that treaty provides for the transfer or cession of the occupied territory into the hands of the occupying power, problems as to government and the administration of justice are questions of constitutional law, to be decided as such,[2] for the treaty by ratification and proclamation becomes the supreme law of the land and

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[1] Although politically the entry of troops into China in 1900 has been deemed intervention, a United States Circuit Court legally reasoned and determined that a state of war existed. *Hamilton* v. *McClaughry* (C. C. Kan. 1905) 136 Fed. 445. Such was undoubtedly the case, for organized hostilities resulted. Vera Cruz in 1914 was similar. See declaration of Mexican Government. This was "an initiation of war". American Year Book (1914) 235. Only the lack of organized hostilities makes the situation in Santo Domingo "intervention" rather than belligerent occupation.

[2] *Cross* v. *Harrison* (U. S. 1853) 16 How. 164; *Leitensdorffer* v. *Webb* (U. S. 1857) 20 How. 176; Sutherland, *Constitutional Power and World Affairs* (1919) 82, 83; *Downes* v. *Bidwell* (1901) 182 U. S. 244, 21 Sup. Ct. 770; *Dorr* v. *United States* (1904) 195 U. S. 138, 24 Sup. Ct. 808; *Balzac* v. *Porto Rico* (1921) 258 U. S. 298, 42 Sup. Ct. 343; *De Lima* v. *Bidwell* (1901) 182 U. S. 1, 21 Sup. Ct. 743; *Dooley* v. *United States* (1901) 182 U. S. 222, 21 Sup. Ct. 762; *Sanchez* v. *United States* (1910) 216 U. S. 167, 30 Sup. Ct. 367.

forms the essential determining part of that constitutional law on which any mooted questions are decided.[3] Whatever is done, is done, not by the laws of war, but by the peace-time authority of the government newly become sovereign in that territory. Even if nothing is done, and war-time conditions are permitted to continue until legislatively changed, the delay is presumed consistent with policy.[4] In the meanwhile military personnel usually continue in control and their acts continue to be valid, even to the establishment of courts of justice.[5]

If the *post bellum* occupation is only temporary, and it is contemplated in the terms of the treaty of peace that it will cease upon the fulfillment of certain conditions,[6] such occupation is "military in name only"[7] and has no reference to the laws of war—only to the contractual relations established by the treaty. It is proper to avoid altogether the term military occupation and to designate such activity simply as a "garrisoning."[8]

The other is the type which is, though governed completely by the laws of war, that occupation of territory which takes place *flagrante bello* or, if an armistice be signed and peace not yet definitely concluded, *nondum cessante bello.* This is what is known as military occupation,[9] sometimes called military government.[10] The most appropriate term for it, however, would seem to be "belligerent occupation"[11] for this phrase implies that conditions of war exist, that the occupa-

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[3] *United States* v. *Percheman* (U. S. 1833) 7 Pet. 51; Treaty of Frankfort, Herslet, Vol. iii, No. 446, arts. ii, ix. *Henderson* v. *Poindexter* (U. S. 1827) 12 Wheat. 530, 535.

[4] *Cross* v. *Harrison, supra,* footnote 2; *Santiago* v. *Nogueras* (1908) 214 U. S. 260, 29 Sup. Ct. 608.

[5] *Leitensdorfer* v. *Webb, supra,* footnote 2.

[6] *E.g.,* Allied occupation of France in 1871, under the Treaty of Frankfort, Herselet, Vol. iii, No. 446, arts. vii, viii; Chilean Occupation of Tacna-Arica, Treaty of Ancon (1883) art. iii; 74 British and Foreign Papers, 349; 10 Martens, *Nouveau Recueil Général de Traités* (2nd ser.) 191; Treaty of Paris, Dec. 11, 1898, (1898) 30 Stat. 1754, arts. 1, 16; Haskins and Lord, *Problems of the Peace Conference* (1920) 131, 144; League of Nations, *Official Journal* (1921) pp. 683-686; *Agreement Supplementary to the Treaty.* Sen. Doc. 81, 66th Cong. 1st Sess. 362.

[7] General Leonard Wood, *The Military Government of Cuba* (1903) 21 Ann. of the Amer. Acad. of Pol. Sci. 153.

[8] This is the view of Bray, *Occupation Militaire,* 127, following Fiore, who seems to be alone among writers on the subject in so holding, but it seems sound, nevertheless. For example such is the state of affairs in Haiti today, by virtue of the Treaty of Peace and Amity of 1915, (1915) 39 Stat. 1654, where that status did not even follow a war; and such was the position of the United States troops in Coblenz, who carefully refrained from interference in any local matters that did not affect their own safety, not even in possible revolution. See R. S. Baker, *America and the World Peace,* N. Y. Times, July 23, 1922; Hyde, *International Law* (1922) 791.

[9] *American Ins. Co.* v. *Canter* (U. S. 1828) 1 Pet. 511; and *Sanchez* v. *United States, supra,* footnote 2.

[10] See Birkhimer, *Military Government and Martial Law* (1892) 21.

[11] This is the term suggested by Hyde, *op. cit.,* footnote 8.

tion is founded upon force, that the laws are laws of war. In using this term there is little likelihood of confusing the subject under discussion with treaty rights,[12] with civil affairs administered by army officers in ceded territory,[13] or with martial law.[14]

Such belligerent occupation may exist only in connection with armed conflict where frontiers have been crossed. It usually exists only within the territories of a national enemy.[15] Yet it has been known to exist, in a legal sense, within rebel territory,[16] when an insurrection against the established government had well defined geographical limitations.[17] It has even been known to exist in neutral territory, as during the Russo-Japanese war in China,[18] and during the World War in Luxemburg, China, and Greece.[19] Never could it be said to exist in

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[12] *Supra,* footnote 4.

[13] *De Lima* v. *Bidwell, supra,* footnote 2; *Sanchez* v. *United States, supra,* footnote 2, deal with acts by such governments, functioning after the exchange of ratifications, under constitutional law rather than under the laws of war.

[14] In the United States "martial law" appears only in home territory where belligerency does not exist; in England the term is applied to all law administered by the army including that in occupied territory. See the *British Manual of Military Law* (1914) 3, par. 15.

[15] See Birkhimer, *op. cit.,* footnote 10, p. 21, defines it is follows: "Military government is that which is established by a commander over occupied enemy territory."

[16] "When a rebellion becomes organized and attains such proportions as to be able to put a formidable military force in the field, it is usual for the established government to concede to it some belligerent rights." *Williams* v. *Bruffy* (1877) 96 U. S. 176, 186. See also Vattel, *The Law of Nations* (1916) bk. 2, c. 18, § 293; (1869) 9 Ops. Atty. Gen. 140; 1 Moore, *A Digest of International Law,* (1906) 43, 49-51; and *Underhill* v. *Hernandez* (1897) 168 U. S. 250, 18 Sup. Ct. 83.

The contrary opinion was held by British officers operating in the southern states during the American Revolution who continued to ridicule the idea of observing capitulations with citizens, insisting that those who claimed to be members of an independent state were but vanquished traitors who owed their lives to British leniency. 6 Bancroft, *History of the United States* (Cent. ed. 1879) 381-382.

[17] *Tyler* v. *Defrees* (U. S. 1870) 1 Wall. 331, 345; *Dow* v. *Johnson* (1879) 100 U. S. 158, 170; *Miller* v. *United States* (U. S. 1870) 11 Wall. 268, 306-307; *Coleman* v. *Tennessee* (1878) 7 U. S. 509, 516-517. This conception was made more readily possible by the Presidental Proclamation of Aug. 16, 1861, stating which states were "in insurrection." See (1861) 12 Stat. 1262. This proclamation granting the rights of belligerents to the Confederates not only set a magnanimous example to other nations regarding internal rebellions, Alvarez, *Le Droit International Americain* (1910) 71, but was also responsible for the establishment of well-defined laws of war for the United States Army (1863) Gen. O. 100, and for the opportunity granted the Supreme Court of the United States to embody in many subsequent decisions sound legal interpretations concerning the effects of belligerent occupation on the laws of occupied territory. See also 1 Moore, *op. cit.,* footnote 16, pp. 57-58; and with regard to Iquique during a Peruvian revolution (1869) 9 Op. Atty. Gen. 140.

[18] See Ariga, *La Guerre Russo-Japonaise* (1908) 429-432.

[19] 2 Garner, *International Law and the World War* (1920) 237, 239, 241 255. It is, however, claimed that the occupation of Salonica in 1915 was initiated with the consent of the Venizelist ministry, which would give a slightly different aspect to the case. Villari, L., *Macedonian Campaign* (1922) 23-25.

allied territory, for in such a case the friendly ally would conduct its own government and the troops would be assisting by invitation and not exercising any belligerent power against the sovereign state or the people in the lands they occupied.

One of the most interesting cases on the law of military forces which has ever been decided in America, laid down the principle that in home territory martial law could not be valid if the courts of the country were open and conducting their affairs.[20] A recent writer has remarked: "The question, in any case, is simply whether the government is powerless."[21] The distinction is rather generally[22] accepted as sound regarding home territory,[23] and sound also with regard to military government set up during belligerent occupation under the laws of war. For before belligerent occupation is entitled to recognition as such, it is necessary "that the authority of the State to which the territory belongs should have ceased there to be exercised."[24] "The government of the conqueror being *de facto* and not *de jure* in character, it must always rest upon the fact of possession which is adverse to the former sovereign.....The criterion.....is the driving out of enemy authorities or their submission to the dominant power."[25] It is a matter of fact, not a matter of law. Attempts to say too precisely what are the legal conditions for its existence frequently meet an impasse, as for instance in the Russo-Japanese War, when the local officials had no authority to retire in the face of a force which was not a national enemy, and an army had no belligerent and hostile justification for compelling their departure, since China—though the battle ground of the armies—was still a neutral nation.[26] In the Annex to Hague Convention IV of 1907 the following words are used: "Territory is considered occupied when it is actually placed under the authority of

[20] *Ex parte Milligan* (U. S. 1866) 4 Wall. 2.

[21] See Glenn, *The Army and the Law* (1918) 190.

[22] For a convenient discussion of the increasing acceptance of this doctrine, see Glenn, *op. cit.*, footnote 21, pp. 186-190.

[23] This conception is used as a basis of judgment in *Handlin* v. *Wickliffe* (U. S. 1870) 12 Wall. 173, 175, and phrased thus: "If.....the civil Constitution of the State was in full operation, independent of military control, the authority derived from the appointment by the military governor ceased....."

[24] Birkhimer, *op. cit.*, footnote 10, p. 21. See also 2 Oppenheim, *International Law* (1920) §§ 166, 167.

[25] Birkhimer, *op. cit.*, footnote 10, p. 48, citing *Thorington* v. *Smith* (U. S. 1868) 8 Wall. 1 and *Fleming* v. *Page* (U. S. 1850) 9 How. 602. See also Wright, *Enforcement of International Law through Municipal Law* (1916) 208, who says: "The law of military government, therefore, is a matter governed by international law."

[26] Ariga, *op. cit.*, footnote 18, pp. 429-432. A circumstance somewhat similar arose in 1806 when Napoleon occupied Hesse-Cassel to avoid dangers arising from the armed neutrality of the Elector, though at the Peace of Tilsit that territory was treated as if it were conquered instead of merely occupied. 2 Phillimore, *International Law* (3d ed. 1879) 842.

the hostile army."[27] Of course mere raids do not constitute occupation, nor invasions which do not attempt to establish any administration. But the actual size and distribution of the occupying forces are immaterial. The test of occupation is its effectiveness. Prussian occupation of portions of France in 1870-1871 was maintained by the mere ability to assert essential power.[28] The extent of the occupation is likewise determined by the test of effectiveness in permanently eliminating the authority of the original government and continuously maintaining the authority of the occupant. It is not the use of mere "flying columns"[29] but the results of their work, by which we must judge. If the damage they do is merely occasional, they are merely raiders and temporary invaders in the districts where they roam, and occupation does not exist.[30] If they take possession of the municipal offices and establish their authority,[31] even if they come and go in the manner of a ranging police force like the state troopers of New Jersey, New York, and Pennsylvania, reinforcing only when necessary the will and acts of their agents, then the outlying districts may be said to be occupied. Such occupation, depending upon fact rather than upon law, has no relation to geographical boundaries of former political units. It exists only by force, and where that force fails it cannot be said to exist.[32] "It is manifest," says Phillimore, "that the conquest.....must not be the mere conquest of a capitol but of a country."[33] Whatever proclama-

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[27] (1907) 36 Stat. 2227, art. 42.

[28] "One could go for miles within the occupied territory without seeing a single Prussian soldier," Bordwell, *Law of War Between Belligerents* (1908) 92-93; also Hall, *International Law* (8th ed., 1924) 501, footnote 1. It is doubtful, though, if even this extreme, sound position could justify the Isle-Adam incident of September, 1870, where a patrol entered the town and retired, returning the next day to collect arms, was ambushed by some non-villagers, and in retaliation gave the town to pillage "because of the rising against them." Bray, *op. cit.*, footnote 8, pp. 171-172.

[29] Bordwell, *op. cit.*, footnote 28, p. 92. See also Oppenheim, *op. cit.*, footnote 24, p. 501, footnote 1; Jacomet, *Les Lois de la Guerre Continentale* (1913) 69; and 1 Busch, M., *Bismarck* (1898) 476, citing remarks of 1871: "We should from time to time send a flying column wherever they show themselves recalcitrant and shoot, hang and burn."

[30] U. S. Army, *Rules of Land Warfare* (1914) § 288.

[31] 2 Oppenheim, *op. cit.*, footnote 24, §167. Bordwell, *op. cit.*, footnote 28, p. 297.

[32] "An occupation giving the right to the conqueror to exercise governmental authority must be not only invasion, but also possession of the enemy's country .....The military occupation by the United States, during and after the War with Spain, of the Philippine Islands, and the conduct of the military government thereof, did not extend to places which were not in actual possession of the United States until they were reduced to such possession. *MacLeod* v. *United States* (1912) 229 U. S. 416, 33 Sup. Ct. 955.

[33] 3 Phillimore, *op. cit.*, footnote 26, p. 823.

tions may say,[34] and whatever dependence municipal law may place upon them,[35] in international law occupation depends solely upon the fact of possession and rule. Indeed, no proclamation is necessary, though they are usually issued[36] to let the inhabitants know what to expect.[37] A proclamation is, however, useful. It may serve as political propaganda, as did Kearny's and Stockton's in the Mexican War, as did Napoleon's extremely adroit one at Alexandria in 1798.[38] It may give due notice to inhabitants as to the new state of affairs, the extent of the new authority, and their new duties and rights,[39] in order to simplify procedure and eliminate future misunderstandings. A proclamation serves the further useful purpose of standing as evidence of intention to occupy—though not necessarily as proof of occupation—and might reasonably be cited when questions arise as to whether or not

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[34] An interesting conflict between international law and municipal law is found in *Van Deventer* v. *Hancke* (1903) Transvaal Sup. Ct. 401, where in spite of the fact that the acts in question were undoubtedly those of a *de facto* government and took place prior to British possession though subsequent to the Proclamation of Annexation, the British court was compelled to refrain from questioning the correctness of Crown proclamations and to hold the British occupation effective on a date when it really was not so. The following is a neutral remark on the topic: "Le gouvernement britannique.....entendit, avant toute annexion et en vertu de la seule occupation de territoire envahi par ses armées, astreindre tous les habitants au devoir de fidélité envers lui." Despagnet, *La Guerre Sud-Africaine* (1902) 213-214.

[35] There is no real contradiction between the Philippines and the Transvaal cases mentioned in footnotes 32 and 34, above. In the Transvaal case, the proclamation announced an annexation which was later rendered effective, and the original state was completely extinguished and rendered powerless to protest. In the Philippines case, the presidential Executive Order did not speak in terms of geography, as did the Transvaal proclamation, but extended the regulations in question only "upon the occupation and possession of parts and places..... by the forces of the United States"—thus making actual military accomplishment the standard of judgment, which is indeed a far sounder one than political pronouncements of belligerent intentions as yet unaccomplished. The difference is a difference in the type of executive declaration, not in the manner of the court decision. Indeed, with a somewhat similar matter, opposing Haitian claims to the island of Navassa, the United States Supreme Court did not hesitate to declare: "Who is the sovereign *de jure* or *de facto* of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges as well as all other officers, citizens, and subjects of government." *Jones v. United States* (1890) 137 U. S. 202, 11 Sup. Ct. 80. See a similar decision in a British court in *Mighell* v. *Sultan of Johore* [1894] L. R. 1 Q. B. 149.

[36] *Rules of Land Warfare* (1912) § 292 (18) (19) (20) (22) *Planters' Bk.* v. *Union Bk.* (U. S. 1879) 6 Wall. 483; 1 Smith, *War with Mexico,* 291, 296, 335; *British Manual Military Law* (1914) § 347. 2 Hyde, *op. cit.,* footnote 8, p. 369, footnote 1.

[37] "Issued merely from abundant caution, as a useful warning to those whom it may concern." Holland, *Letters upon War and Neutrality* (3d ed. 1918) 112.

[38] So characterized, and summarized in 8 Cambridge Modern History (1909) 599. Commandant Guitry, *L'Armé de Bonaparte en Egypte,* 87.

[39] *Cf.* discussion of Gen. Pershing's 1918 proclamations and texts, in Smith, H. A., *Military Government* (1920) 88, 99-101. Wellington deemed a proclamation necessary. 115 Hansard, *Parliamentary Debates* (3d ser. 1891) 880 cited in Hall, *International Law* (4th ed.) 489.

the occupation is complete and disputes as to whether or not flying columns function merely as harrassing units or as upholders of scattered administrative elements. In such a proclamation, however, expectation should not outrun accomplishment. Its statements regarding territorial limits of control should be based upon achieved results. It should be a record of events. If it is such, it will be a valuable historical document, not because it announces a policy, not because it advertises the fact of occupation, but chiefly because it will tell of the scope of that occupation already established. It records, but does not create, occupation. The occupation itself extends to the territory where the authority of the hostile army has been established and can be exercised.[40] It exists where it exists because it is a fact, not because it is law;[41] it is founded on military might *flagrante bello* or else *nondum cessante bello;* it is a belligerent act, maintained by belligerent methods and for belligerent purposes.

In its purpose and methods belligerent occupation limits its own life. Founded on force, it may be overthrown by force. If the invasion which made it possible is repulsed after a lapse of time, the occupation necessarily ceases. As a fact it has ceased to exist. It does not cease, though, simply because the armed soldiers who established it pass on to wage their continued campaign against the national armies of the native country.[42] In such cases, to protect their rear, they leave details and administrative agents behind to maintain their authority over the disarmed and powerless inhabitants. Occupation does cease definitely when a military reverse or a strategic withdrawal permits the original officials to return and institute again the functions and processes of their administration. It likewise ceases with the treaty of peace, whatever the fate of the territory. If the occupied lands are returned to the possession of the original owner, the national sovereignty reasserts itself. If the occupied lands are ceded to the occupant, belligerent occupation forthwith ceases simply and obviously because belligerency has come to an end. The same officials may administer the government. They may conform to the same laws. They may be the identical officers of the army who acted in the identical capacity before. But "the government so established....ends with the restoration of peace, and the resumption of the regular municipal government of peace."[43] Though the military commander may still govern, because his own government

[40] Annex to Hague Convention, IV of 1907, art. 42; (1907) 36 Stat. 2277.
[41] Bynkershoek, *Law of War* (1810) 56; "Occupation which is had in war consists more in fact than in Law."
[42] 2 Oppenheim, *op. cit.,* footnote 29, §168.
[43] *Isbell* v. *Farris* (Tenn. 1868) 5 Cold. 426.

so wishes, with an "actual or implied consent",[44] he administers the laws of peace and not of war. His authority is no longer to promote warfare, but to preserve peace.[45] It would be unwise to say, however, that an armistice terminated belligerent occupation.[46] In 1918 indeed it actually created a belligerent occupation of the Rhineland.[47] On one view of this case, the march into Germany of the allied and associated powers might be said to be a contractual act similar to those already mentioned as *post bellum* occupations, but it seems that the warrant for this march was belligerent, because armistices are belligerent acts, and quite different from treaties. Not by armistices, therefore, but by treaties, is belligerent occupation terminated.[48] In fact, the period between the signing of an armistice and the ratification of a treaty of peace, is the only period which can appropriately be described by the terms *nondum cessante bello.* During this period control is purely based on belligerent force; the occupation is a belligerent occupation; the occupation as a belligerent fact ceases and the permanent sovereignty commences at the exchange of the ratifications of the treaty.[49]

"The holding of a conquered territory is regarded as a mere military occupation until its fate shall be determined at the treaty of

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[44] *Ex parte Milligan, supra,* footnote 20.

[45] Sutherland, *op. cit.,* footnote 2, pp. 81, 82. See citations above, footnotes 1 and 2, notably the analysis of the changing status of Porto Rico as set forth in *De Lima* v. *Bidwell, supra,* footnote 2 and in *Sanchez* v. *United States, supra,* footnote 2.

[46] 2 Oppenheim, *op. cit.,* footnote 29, §231, is quite emphatic in declaring that an armistice, though a temporary cessation of hostilities, is "in no wise to be compared with peace, and ought not to be called temporary peace." He cites, most aptly, the Franco-German armistice of January 28, 1871, the purpose of which was expressly declared to be "the creation of the possibility for the French Government to convoke a Parliamentary Assembly which could determine whether or not the war was to be continued." (§233.)

[47] *Text of Armistice Signed by Germany* (1918) 9 Cur. Hist. Mag. 364. This is to be distinguished from the Treaty occupation. (1919) Sen. Doc. No. 75, 66th Cong. 1st Sess.; 2 Hyde, *op. cit.,* footnote 8, p. 362.

[48] This has been the practice of the United States. It has been announced "that a state of war existed between Spain and the United States, and the Island (of Porto Rico) remained Spanish territory....until April 11, 1899, when ratifications of the treaty of peace were exchanged." *Ex parte Ortiz* (C. C. Minn. 1900) 100 Fed. 955. "The holding of a conquered territory is regarded as mere military occupation until its fate shall be determined at the treaty of peace." *American Ins. Co.* v. *Canter, supra,* footnote 9.

[49] *Armstrong* v. *Bidwell* (C. C. N. Y. 1903) 124 Fed. 690; *De Lima* v. *Bidwell supra,* footnote 2; *Dooley* v. *United States, supra,* footnote 2; *Ponce* v. *Roman Catholic Church* (1908) 210 U. S. 296, 307, 28 Sup. Ct. 737; *Sanchez* v. *United States, supra,* footnote 2; *DePass* v. *Bidwell* (C. C. N. Y. 1903) 124 Fed. 615, 619; *Howell* v. *Bidwell* (C. C. N. Y. 1903) 124 Fed. 688; *Isbell* v. *Farris, supra,* footnote 43; *Ochoa* v. *Hernandez* (1913) 230 U. S. 139, 159, 33 Sup. Ct. 1033. There should, however, be noted the following *contra* cases, though of very old date, where the end of the war was considered to have come at the signing of the peace treaty, not at the ratification thereof. *Bain* v. *The Speedwell* (U. S. 1784) 2 Dall. 40; *The Mentor* (1799) 1 C. Rob. 179.

peace."[50] This is the modern doctrine. There was a time when war was considered a method primarily of acquiring territory instead of fighting for trade privileges and economic rights. What a nation conquered, it held. Sometimes seizures were traded against one another over the diplomatic tables of peace congresses. But usually military conquest meant ownership. Then the entire complexion of the world changed. Small professional armies were replaced by huge national forces. Intricacies of governmental administration, of military supply, and of economic coördination of national resources increased to such an extent that military commanders aimed to seize a capital city and there dictate their terms, rather than merely to occupy and hold the districts which they coveted. As the decades passed, occupation became more and more merely a means of war instead of an end of war. It was in purpose as well as in fact belligerent, an act of war, without necessarily any prospects of permanence.[51] Still, though, the old notion of transferred sovereignty remained, even if only in the sense of temporary sovereignty. There is some question as to whether a treaty clause stipulating cession actually transfers the territory or merely recognizes the fact of cession already accomplished by belligerent occupation. But it seems that, in view of the many precedents of withdrawal from conquered districts, in view of the occasional cession in treaties of lands not involved in hostilities, the safest procedure is to view cession a function of treaties, and belligerent occupation as involving only a temporary

[50] *American Ins. Co.* v. *Canter, supra,* footnote 9.

[51] We find such opposite expressions in modern times as these: "To complete the right of property, *the right to the thing,* and *the possession of the thing itself,* should be united. This is the general law of property and applies, I conceive, no less to the right of territory than to other rights." Sir William Scott in *The Fama* (1805) 5 C. Rob. 106, 125. "The acquisition of land by conquest shall not.....be recognized under American Public Law." Resolutions at International American Congress, 1889-1890, 1 Moore, *op. cit.,* footnote 16, p. 292; 7 *id.* p. 318. "Conquest does not give title. It merely creates occupation." Bordwell, *op. cit.,* footnote 28, pp. 57-58. "Various and many treaties of peace fortify the sound international doctrine that *conquest* and *occupation* of territory are distinct public acts, both to the state and to the individual." 3 Phillimore, *op. cit.,* footnote 26, p. 785. "Le transfert de la souverainetè en droit, avec toutes les consequences juridiques qu'il entraine, ne se produit que par la cession contractuelle du territoire a la conclusion de la paix, c'est-a-dire par l'annexion proprement dite". Despagnet, *op. cit.,* footnote 34, p. 144. "The courts have held that under the Constitution Congress has no power to declare wars for conquest; hence the United States cannot acquire new territory by conquests." Wright, *op. cit.,* footnote 25, p. 25, citing *Fleming* v. *Page, supra,* footnote 25. "By the law of nations, the *occupatio bellica* transfers the sovereign power to the conqueror." Birkhimer, *op. cit.,* footnote 10, p. 28, citing (1857) 8 Ops. Atty. Gen. 365, 369. "The principle that the wishes of a population are to be consulted when the territory which they inhabit is ceded has not been adopted into international law, and cannot be adopted into it until title by conquest has disappeared". Hall, *op. cit.,* footnote 39, p. 49. ".....a conquerer prescribes the limits of the right of conquest....." and the terms and conditions of peace. *The Cherokees and their Lands* (1830) 2 Ops. Atty. Gen., 321, 323, citing Marshall in *Johnson* v. *McIntosh* (U. S. 1823) 8 Wheat. 543, 588.

transfer of sovereignty if any at all. Practices may differ slightly on account of varying constitutional restrictions upon the foreign relations powers and the war powers of the agents of different governments which carry on wars, but in the long run we must depend upon international rather than upon municipal law for our conception as to the true world-wide conception of belligerent occupation.[52] Formerly it used to be said that "the intention of the conqueror is not merely to invade one district, but the whole of the hostile empire, and to make his own all the countries belonging to it."[53] Then under the influence of Rousseau and Locke and in view of the practices of the armies of the French Revolution,[54] the strict rule was relaxed and military occupation was looked upon as temporary,[55] as limited to the period of belligerency in its effects. However the old practices persisted in leaving their impress on modern theory. Jurists have compared the administration of occupied territory with the administration of national affairs by revolutionary officials and have said that the conqueror sets up a *de facto* government and that to such a government "obedience in civil and local matters" is "not only a necessity but a duty."[56] "By the conquest and military occupation of Castine," said Mr. Justice Story, speaking of the British control of the Maine town in 1814, "the enemy acquired that firm possession which enabled him to exercise the full rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, sus-

[52] *Rutledge* v. *Fogg, Ex'r* (Tenn. 1866) 3 Cold. 554; Birkhimer, *op. cit.*, footnote 10, p. 28, citing Maine, *International Law* (1888) 179; *30 Hogsheads of Sugar* v. *Boyle* (U. S. 1815) 9 Cranch 191, citing *Fleming* v. *Page, supra,* footnote 25, pp. 615-616 and *Cross* v. *Harrison, supra,* footnote 2, citing 2 Bl. Comm. *107; 4 *id.* pp. 414-415, and Dana's Wheaton, *International Law* (8th ed. 1866) §345, holds that "mere occupation and control" are insufficient and that to it should be added express transfer in capitulations or in treaty or else "a long lapse of time". *Cf.* also Sutherland, *op. cit.,* footnote 2, footnote 80.

[53] Bynkershoek, *op. cit.,* footnote 41, p. 48.

[54] Title VI, Const. of 1791. Anderson, *Constitutions and Documents,* 93. Also French Decree of May 22-27, 1790, art. 4, see 1 Duvergier, *Collection Complète des Lois* (1824) 191. For brief historical survey of change in point of view on this point, see 2 Westlake, *Principles of International Law* (2d ed. 1910) 95, 96.

[55] Heffter, *Le Droit International Publique de L'Europe* (1866) §§132-133. See the very able survey of British cases appearing in the opinion of the court in *The Gerasimo* (1857) 11 Moore P. C. 88. Note also the dictum in *United States* v. *Hayward* (C. C. Mass. 1815) 2 Gall. 485: "A territory conquered by the enemy is not to be considered as incorporated into the dominions of that enemy, without a renunciation in a treaty of peace, or a long and permanent possession." Nashville, Tenn., though occupied by Union troops, was held to be "enemy territory" on account of the Presidential proclamation of Aug. 16, 1861, (1861) 12 Stat. 1262, regarding states in insurrection. *Hamilton* v. *Dillin* (U. S. 1874) 21 Wall. 73.

[56] *Thorington* v. *Smith, supra,* footnote 25. See also 1 Bluntschli, *Le Droit International* (1895) §§ 35, 36a, 42, 64, and Ordonnance of Andjuar, 1823, in 5 Pasquier, *Memoires du Chancelier,* 517.

pended, and the laws of the United States could no longer be rightfully enforced there..... By the surrender the inhabitants passed under a temporary allegiance to the British government."[57] This is one point of view, then, that "sovereignty passes immediately upon effectual occupation of the territory"[58] even though such sovereignty is only temporary and the title is only valid "while the victor maintains exclusive possession of the conquered territory."[59] This conception has been maintained by Birkhimer, who declares: "The unlawfulness of trade with the enemy extends not only to every place within his dominions and subject to his government, but also to all places in his possession or military occupation, even though such occupation has not ripened into a conquest or changed the national character of the inhabitants."[60] The United States Supreme Court has adopted this theory, holding, in the case of a ship belonging to and carrying produce from a Danish citizen to Santa Cruz then occupied by Great Britain as an act of war, that "for belligerent and commercial purposes" Santa Cruz was properly to be considered "a part of the domain of the conqueror."[61]

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[57] *United States* v. *Rice* (U. S. 1819) 4 Wheat. 246. Commenting upon this case, Chief Justice Chase in *Thorington* v. *Smith, supra,* footnote 25, declared: "It is not to be inferred from this that the obligations of the people of Castine as citizens of the United States were abrogated. They were suspended merely by the presence, and only during the presence, of the paramount force". This principle was followed in a naturalization and citizenship case in 1830, arising out of the capture of Charlestown by the British in 1780. *Shanks* v. *Dupont* (U. S. 1830) 3 Pet. 242, 246.

[58] Wright, *op. cit.,* footnote 25, p. 208, who states it as a doctrine, but does not agree with it. In 1814, Moose Island fell to the British and American inhabitants were required to take the oath of allegiance to the crown of Great Britain, and the Islands of Passamaquoddy Bay were taken because it was felt that they belonged to Great Britain by the treaty of 1783. See 4 McMaster, *History of the People of the United States* (1883) 130, 131, 133; Daily American Advertiser, Aug. 1, 1814. Wright, *Control of American Foreign Relations* (1922) 297, further states that a Congressional declaration of war "authorizes the President to both occupy and militarily govern enemy territory, although it does not authorize him to annex it". Ch. de Visscher, *L'Occupation de Guerre* (1918) 34 Law Quart. Rev. 72, likewise holds that military occupation in itself is not a source of sovereignty.

[59] *Fleming* v. *Page, supra,* footnote 25, and *American Ins. Co.* v. *Canter, supra,* footnote 9. An interesting example of this attitude is found in the declaration of the incoming Governor General of Alsace in 1870, though of course this declaration was motivated by the apparent intention of the Germans to regain and retain that province: "Les événements de la guerre ayant amené l'occupation d'une partie du territoire française par les forces allemandes, ces territoires se trouvent par ce fait même soustraits à la souveraineté impériale, et en place de laquelle est établie l'autorité des puissance allemandes". Hall, *op. cit.,* footnote 39, p. 486.

[60] *Op. cit.,* footnote 10, p. 229, citing Halleck, *International Law* (4th ed. 1908) c. 1, §20; Woolsey, *Introduction to Study of International Law* (5th ed. 1885) §124; 1 Kent, *Commentaries* (14th ed. 1896) 68 (c); and *contra, The Hoop* (1799) 1 C. Rob. 196, 209.

[61] *30 Hogsheads of Sugar* v. *Boyle, supra,* footnote 52.

The Judicial Committee of the Privy Council of Great Britain took a contrary stand,[62] in the case of a ship and a cargo belonging to a Moldavian under the Moravian flag captured during the Crimean war while Russia occupied those districts with the express policy of not altering their political status and of not incorporating them into the Russian Empire. "The mere possession of a territory," said the court, "does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies." Yet, for purposes of trading with the enemy acts, and for determination of nationality and jurisdiction, it seems that there must be a change. Modern war is so much an economic affair in its causes and in its conduct. It is so much a popular affair with its conscriptions and selective service. For the period of the war, all occupied territory must be considered as part of the resources of the occupant. He can levy large contributions. He can develop to his own advantage such natural resources as will assist him in prosecuting his campaign with weightier or more numerous pieces of material. When you try to fix "an iron ring" around Germany or any other nation and have to enlarge its diameter and circumference because of certain military successes which the armies of that nation may have had, you must include within your ring all the land in rear of his armies. He will use that territory as if it were his own, working civilians in factories, coal mines, and in productive agricultural lands, repressing non-essential industries there as thoroughly as he represses them in his own hard-pressed districts behind his original frontiers. For all practical purposes, the territory has changed hands. True it is only a temporary transfer, subject to being changed back with the changing fortunes of war, either as an incident to the successful campaigns or as a provision of treaty stipulations. But for the time being it is enemy territory, so far as the ousted nation is concerned.

Belligerent occupation is an incident of war. It is a means of carrying on a war. It is "a legitimate method of warfare."[63] The soldiers say that "the seal of victory is the occupation of territory."[64] It adds to

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[62] *The Gerasimo, supra,* footnote 55. This matter was summarily decided, almost in an introductory manner, while the greater part of the decision was taken up with the problem as to whether or not the fact of occupation needed to be supplemented by cession or conquest to make the occupied territory a part of the dominions of the occupant. The opinion states: "the proposition..... cannot be maintained.....(that it is) sufficient that the territory in question should be occupied by a hostile force, and subjected, during its occupation, to the control of the hostile power, so far as such power may think fit to exercise control."

[63] Wright, *op. cit.,* footnote 58, p. 297.

[64] Major R. Cheneoux-Trench, in Gold Medal Prize Essay for 1922, *Scientific Inventions and Sciences* (1923) 68 Journ. Roy. Unit. Serv. Inst. 199, cited in (1923) Chem. Warfare 2.

the resources of the occupying power in men, money, and provisions; and subtracts from those same resources of the enemy. Its purpose is military.[65] War is the litigation of nations. Questions in dispute are settled by force. Belligerent occupation is a forceful seizure and maintenance of firm possession of enemy property. The orders of military commanders have no further permanent efficacy than such as they draw from the force which makes them possible and upholds them.[66] Army officers are usually in control.[67] Obviously what governs is not law at all, but merely expedient regulations designed to accomplish military ends that are deemed necessary. In some respects the Hague Conventions restrict action, but even they can be avoided on a just plea of military necessity, of reprisals, or of superior orders and national policy. Wellington, in the House of Lords in 1851, called it "neither more nor less than the will of the general who commands the army....no law at all."[68] As far as municipal law is concerned the supreme power is "the arbitrary will of the commander exercised without reference to any principle and subject to no limitation or, as said by Sir Matthew Hale 'something indulged, rather than allowed as law.' The power, whatever it may be called, is one which finds no limitations in the Constitution, or in the general laws of the land. Its arbitrary and absolute character is shown by the ancient maxim by which it is characterized: 'The will of the conqueror is the law of the conquered.' "[69] The United States Supreme Court has stated the situation succinctly:

"The conquering power has a right to displace the pre-existing authority, and to assume, to such extent as it may deem proper, the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe

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[65] Magoon, *Reports on the Law of Civil Governments in Territory Subject to Military Occupation* (1902) 11, citing *Ex parte Milligan, supra,* footnote 20.

[66] *Varner* v. *Arnold* (1880) 83 N. C. 206, cited by 7 Moore, *op. cit.,* footnote 16, p. 268.

[67] The Japanese once tried to utilize as administrators former consuls, secretaries of foreign affairs, officials from open ports, but found civilians ineffective and inappropriate, possibly because a rule of force is best administered by a man with the prestige and power of military uniform and rank, admittedly because they were unfitted to coöperate with the army in the issuing of orders and the infliction of purely military punishments. The Japanese social, almost caste, distinctions between civil and military personnel were also attributed as reasons for the failure of the experiment. Ariga, *La Guerre Sino-Japanaise* (1896) 178. Disastrous results, though dissimilar, followed the mixing of civilians and soldiers in ruling Belgium in 1793. 7 Cambridge Modern History, 418. A similar experiment was attempted at San Francisco in 1846. *Trenouth* v. *San Francisco* (1879) 100 U. S. 251.

[68] 115 Hansard, *op. cit.,* footnote 39, p. 880.

[69] Sutherland, *op. cit.,* footnote 2, p. 80 concerning General Butler at New Orleans it was decided that "his will was law". *United States* v. *Diekelman* (1875) 92 U. S. 520, 526.

the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war."[70]

The Hague Convention and Annex covering this matter are really very scant in extent, and very superficial in character. In the very preamble of that document it is frankly admitted that "all the circumstances" have not been covered and that "unforeseen cases" will arise.[71] And such things are left in vague and general terms—and therefore meaningless since they can be interpreted in various ways and always in view of that elastic doctrine of military necessity—to "the principles of the law of nations, the usages among civilized peoples, the laws of humanity, and the dictates of the public conscience." Truly as ex-Senator Sutherland has remarked,[72] concerning the maxim about the will of the conqueror being the law of the conquered:

"The harshness of this ancient rule, in actual practice, has long since passed away. As administered under the usages of modern and civilized nations, military government is tempered by the dictates of fairness and humanity, and kept, as far as possible, within the bounds of necessity; the civil rights of the inhabitants are interfered with as little as possible; and the municipal laws, at the time in force within the occupied territory, are followed and enforced unless they tend to interfere with the prosecution of military operations, or the acomplishment of the objects for which the warfare was inaugurated. Nevertheless, as long as actual warfare continues, the ancient maxim is the yard-stick by which the power is ultimately measured."

There was a time when pillage invariably followed a successful assault.[73] The ravages of the Thirty Years War, including the sack of Magdeburg, were once considered normal acts of war, justified in intent and result as a means of crippling the enemy.[74] There was a time, "when

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[70] *New Orleans* v. *Steamship Co.* (U. S. 1874) 20 Wall. 387, 394. Cited with approval in *Daniel* v. *Hutcheson* (1893) 86 Tex. 51, 61, 22 S. W. 933; Magoon, *op. cit.*, footnote 65, p. 13.

[71] (1907) 36 Stat. 2277.

[72] Though this dictum was not delivered from the bench of the Supreme Court where he now sits but from a lecture rostrum during the World War, it must nevertheless be taken in a very special sense, for at the time when he was speaking most Americans were engaged in assimilating without deliberation the anti-German propaganda then being spread broadcast by the Committee on Public Information in an attempt to incite the nations for war purposes because of the supposedly awful things the soldiers of the Central Powers, and the High Command itself, had been doing in occupied Belgium. The quotation is from *Constitutional Powers and World Affairs* (1919) 80.

[73] Nys, *Les Origines du Droit International* (1894) 221; 1 Walker, *History of the Law of Nations* (1899) 132.

[74] Hall, *op. cit.*, footnote 39, p. 442, footnote 1.

arms were once taken up, all reverence for divine and human law was thrown away, just as if men were thenceforth authorized to commit all crimes without restraint."[75] But within a century the American government has laid it down that "men who take up arms against one another in public war do not cease on this accout to be moral beings, responsible to one another and to God."[76] And the British government has announced to its men in uniform: "The dictates of religion, morality, civilization, and chivalry ought to be obeyed."[77]

It is clearly within the interests of the occupying government to maintain order and tranquillity in the occupied territory. This is for the general facilitation of such military operations as may still be in progress as well as for general prevention of anarchy and the maintenance of decency and order. Within the territory are soldiers carrying out the wishes of one belligerent, and civilians obligated by nationality to the other belligerent. All of these are subject to the will of the supreme commander of the occupation army. But in different ways and for different purposes.

Law in modern times is primarily territorial in effect. Jurisdiction is in general limited by national frontiers. Yet to this sound theory armed forces form a distinct exception. Military law is non-territorial and is personal in effect.[78] It is applicable to persons subject thereto, wherever they may be, provided only they be officers or soldiers in the army, or civilians connected therewith.[79] In all matters that affect the relations of soldiers with one another, military law governs, and is administered through courts-martial,[80] and this is true whether the army be at home or abroad. "Wherever they are, they remain subject to the articles of war, army regulations, and the general orders of the War Department."[81] Disorders and neglects to the prejudice of good order and

[75] Grotius, *De jure Belli et Pacis* (1625) § 28.

[76] (1863) Gen. O. 199, § 15. Not repeated in (1914) *Rules of Land Warfare* § 12.

[77] *British Manual of Military Law* (1914) c. 14, par. 39.

[78] (1912) Dig. Ops. J. A. G., p. 511, no. VIII B; Wright, *op. cit.,* footnote 25, p. 38.

[79] U. S. Army, *Manual for Courts Martial* (1921) 47; *British Manual of Military Law* (1914) 576.

[80] Excepting only, of course, those instances which come before Courts of Inquiry (M. C. M., 1921, par. 3d, 447-475) which are not now so rare as hitherto, on account of the operation of §246 of the Act of Congress approved June 4th, 1920.

[81] Wright, *op. cit.,* footnote 25, p. 38. The British book, *Manual of Military Law* (1914) c. 1, par. 3, says: "In peace and in war, at home and abroad, at all times and in all places, the conduct of officers and soliders as such is regulated by military law." The Japanese practice is exemplified in the following case; from the instructions of Marshall Oyama to the commander of the Second Army: "Les actes illégaux et coupables commis par un Japonais qui se trouvera sur le territoire occupé, punissibles en vertu du code pénal militaire et du code d'instruction criminelle militaire, seront déférés au conseil de guerre." Ariga, *op. cit.*. footnote 67, p. 188.

military discipline and conduct of a nature to bring discredit upon the military service committed by members of the occupant army are subject to the military jurisdiction of that army, and only to that jurisdiction. This has been maintained with reference to troops in friendly foreign territory,[82] in cases of invasion or intervention where a state of war seems to but does not legally exist,[83] in rebel territory,[84] and—very naturally—in hostile territory.[85] They are "exempt from the civil and criminal jurisdiction" of an enemy's territory.[86] "When our armies marched into the enemy's country," says the Supreme Court, "their officers and soldiers were not subject to its laws."[87]

It is not proper, I believe, to go so far as to say that "criminal jurisdiction over the soldier, when in the enemy's country, is exclusively vested in the court martial."[88] It is true that this was the principle followed by Pershing in Germany and Luxemburg, when he specifically forbade members of the American or allied forces being tried by the military commissions or provost courts, which he had established as an incident to the occupation of the Rhine districts.[89] It is true that at Matamoras in 1846, Taylor hesitated to bring offenders before a military court and shipped them back to the States,[90] and also that at Puebla in 1847 General Worth actually went so far in agreeing that "Mexican law, to be administered by Mexican authorities, should remain in force"

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[82] *The Exchange* (U. S. 1812) 7 Cranch 116, 139; The *contra* case of *The People* v. *McLeod* (N. Y. 1841) 25 Wend. 483; 26 Wend. 663; 2 Moore, *op. cit.*, footnote 16, pp. 24-25, is not really so, because diplomatic action sustained in this matter the validity of international law as against the municipal law of New York State and Congress made haste to enact legislation, Rev. Stat. §753, U. S. Comp. Stat. (1916) §1281; 2 Moore, *op. cit.*, footnote 16, 30, which would prevent future contraventions of the international rule. Also discussed in *Coleman* v. *Tennessee, supra,* footnote 17.

[83] *Hamilton* v. *McClaughry, supra,* footnote 1.

[84] 24 Ops. Atty. Gen. 570, to the Secretary of War, January 26th, 1903. "The parties to a civil war usually concede to each other belligerent rights". *The Prize Cases* (1862) 67 U. S. 635, 666.

[85] *Coleman* v. *Tennessee, supra,* footnote 17; *Dow* v. *Johnson, supra,* footnote 17, p. 165; (1849) 5 Ops. Atty. Gen. 58; *Mitcheli* v. *Clark* (1883) 110 U. S. 633, 648, 4 Sup. Ct. 170; *Freeland* v. *Williams* (1889) 131 U. S. 405, 416, 9 Sup. Ct. 763; also Birkhimer, *op. cit.*, footnote 10, p. 29.

[86] *Cf.* Glenn, *op. cit.*, footnote 21, pp. 90-97. It was so announced in the ordinance of the governor general of Rheims, Nov. 5, 1870, Bray, *op. cit.*, footnote 8, p. 307.

[87] *Dow* v. *Johnson, supra,* footnote 17, p. 165, followed in *Freeland* v. *Williams, supra,* footnote 85, p. 416.

[88] Glenn, *op. cit.*, footnote 21, p. 93.

[89] Smith, *op. cit.*, footnote 39, p. 103, par. 15; Gen. John J. Pershing, *Final Report* (1919) 88.

[90] 2 Smith, *op. cit.*, footnote 36, p. 211. For facts of disorders, see Smith, *American Rule in Mexico* (1918) 22 Amer. Hist. Rev., 287. The text of Scott's memorandum to the Secretary of War on the need of new rules is given in Appendix. Townsend, *Anecdotes of the Civil War,* 279-283.

with regard to soldiers that General Scott had to correct the error.[91] We have contrary precedent established as early as 1862 by General McClellan at Yorktown who ordered that "acts commonly recognized as crimes against society" by "soldiers, officers, or other persons connected with the army" were "punishable by a court or military commission."[92] We find in the Manual of Military Law governing such things in the British Army,[93] that though "officers, men, and followers of the occupying force....are dealt with by the military law of their army" an "exceptional" kind of court-martial may be devised for the punishment of offenses committed by them against the laws of war. Also, the practice of Pershing to the contrary notwithstanding, the newest edition of the Manual for Courts-Martial in the United States Army gives military commissions express statutory jurisdiction over certain offenses,[94] and they have been permitted to assume jurisdiction in cases of such offenses as forcing a safeguard or intimidation of persons bringing supplies.[95] The Manual quite evidently intends that "offenders against the laws of war, and under martial law, and military government" may be tried by military commissions even if they be part of the army itself, for it distinctly states that in such cases "the General Court Martial has concurrent jurisdiction with military commissions and provost courts."[96] The courts-martial do not, then, have exclusive criminal jurisdiction over the military, at least in law.

Yet, as regards purely military offenses such as are specified in the Articles of War, it would seem best to follow the practice of Pershing. The form and procedure of the courts-martial are more fixed and less liable to error; it has been more clearly and completely settled by statute, executive order, and custom; it has a well recognized[97] and clearly derived jurisdiction.[98] It is intended for the scrutiny and judgment of offenses committed by soldiers against other soldiers and against military laws. It is the more familiar to the personnel who will be proceeding in judgment, as well as to the military persons who appear before

[91] 2 Smith, *op. cit.*, footnote 36, pp. 70-71. "No one connected with the army could be tried by Mexican tribunals." 2 Smith *id.*, p. 230.

[92] *Army of the Potomac,* Gen. O. 2, April 7, 1862, cited in (1861) 9 Rebellion Record, pt. 3, p. 77.

[93] C. 14, par. 365; c. 5, pars. 1, 24, 25.

[94] *Articles of War* (1920) 80, 81 82, cited M. C. M. p. 2.

[95] *Articles of War* (1920) 78, 88.

[96] U. S. Army, *Manual for Courts Martial* (1921) 2.

[97] *Deming* v. *McClaughry* (C. C. A. 8th Cir. 1902) 113 Fed. 639, 650; *aff'd., McClaughry* v. *Deming* (1902) 186 U. S. 49, 63, 22 Sup. Ct. 786; *Grafton* v. *United States* (1907) 206 U. S. 333, 347-348, 27 Sup. Ct. 749; *Dynes* v. *Hoover* (1857) 61 U. S. 65, 81; (1865) 11 Ops. Atty. Gen. 19, 21; *Hamilton* v. *McClaughry, supra,* footnote 1.

[98] U. S. Const., Amend. V; Act of Congress approved June 4th, 1920, 41 Stat. 759, U. S. Comp. Stat. (Supp. 1923)§1715a; Presidential Executive Order, December 17, 1920; U. S. Army, *Manual for Courts-Martial* (1921) 26, especially.

the bar. General McClellan, in the instance cited, tried to preserve as much business as possible for courts-martial by prescribing that "no acts already recognizable by courts martial shall be tried by military commissions." And the present American Manual, though stating that "the rule has not always been strictly observed" and instancing the exceptions already mentioned, declares:

"It has generally been held that military commissions have no jurisdiction of such purely military offenses specified in the Articles of War as those articles expressly make punishable by sentence of courts-martial except where the military commission is given express statutory jurisdiction of the offense; and in repeated instances where military commissions have assumed such jurisdiction, their proceedings have been declared invalid in general orders."[99]

We next approach an anomalous situation in law. Suppose,—and it is scarcely necessary to so suppose, for the thing frequently happens,—there is a matter which concerns soldiers and civilians. One of the parties is a non-resident and subject to the military law of the army, simply because it is non-territorial and personal in effect. The other is subject to the authority of both the quasi-judicial tribunals, established and the army, not on account of any personal relations—for by nationality and preference he is bound elsewhere—but simply because he happens to be within the territories for the time being controlled by that army. For instance, if a street fight occurs between the two with no assignable cause or fault on either side, and the parties are brought up for punishment, the authority and jurisdiction over one is personal and over the other territorial, over the one permanent and over the other temporary, over the one for violation of military law and over the other for violation of the laws of war. The soldier would likely be tried by court-martial for committting acts to the prejudice of good order and military discipline, or of such a nature as to bring discredit upon the military service, under the Ninety-Sixth Article of War, if not specifically for assault with intent to do bodily harm. The civilian would likely be tried by military commission for disorder, breach of the peace, acts against a member of the occupying force,—in fact for generally acting so as to disturb the firm hold of the occupant and to distract his attention from the weightier matters of war. The instance is exaggerated. Yet it shows exactly what would be the situation if these two hypothetical persons committed their offenses independently of one another, in time and

[99] U. S. Army, *Manual for Courts Martial* (1921) 3.

place. The army man would be tried by court-martial. The civilian would be brought before a military commission.[100]

Nevertheless, the difference, as far as the civilian inhabitant is concerned is merely a difference in form. Both the courts-martial and the military commissions derive their authority from the commander of the occupying force. Punishment will be inflicted upon the man by a government which has forced itself upon him. The ultimate power of punishment is that created by belligerent occupation. It is of little consequence whether such government be called a military or a civil government; its character is the same, and the source of its authority the same; in either case it is a government imposed by the laws of war, and so far as it concerns the inhabitants of such territory, those laws alone determine the legality or illegality of its acts.[101] That is, when they are not determined by the circumstances of an offense or the necessities of the moment.[102]

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(To be continued)

[100] According to the U. S. Army, *Manual for Courts Martial* (1921) 2-3, "The General Court Martial has concurrent jurisdiction with military commissions and provost courts to try any offender who by the law of war is subject to trial by military tribunals". Yet the practice of Pershing, already noted, not to try civilians before courts-martial seems sound. It is of course provided that spies shall be tried by court-martial, this specifically in the Articles of War.

[101] 2 Halleck, *op. cit.*, footnote 60, p. 466.

[102] Ariga, *op. cit.*, footnote 67, p. 214.